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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/866,793	05/30/2001	Stephen Joseph Vesper	VESPER1	5682

1444 7590 08/29/2005

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EXAMINER

DUFFY, PATRICIA ANN

ART UNIT PAPER NUMBER

1645

DATE MAILED: 08/29/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action  
Before the Filing of an Appeal Brief**

Application No. 09/866,793	Applicant(s) VESPER, STEPHEN JOSEPH	
Examiner Patricia A. Duffy	Art Unit 1645	

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 24 June 2005 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1.  The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a)  The period for reply expires 3 months from the mailing date of the final rejection.  
b)  The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**NOTICE OF APPEAL**

2.  The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

**AMENDMENTS**

3.  The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
(a)  They raise new issues that would require further consideration and/or search (see NOTE below);  
(b)  They raise the issue of new matter (see NOTE below);  
(c)  They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d)  They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet. (See 37 CFR 1.116 and 41.33(a)).

4.  The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
5.  Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
6.  Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
7.  For purposes of appeal, the proposed amendment(s): a)  will not be entered, or b)  will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
The status of the claim(s) is (or will be) as follows:  
Claim(s) allowed: \_\_\_\_\_.  
Claim(s) objected to: \_\_\_\_\_.  
Claim(s) rejected: 23-33.  
Claim(s) withdrawn from consideration: 34-38.

**AFFIDAVIT OR OTHER EVIDENCE**

8.  The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
9.  The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
10.  The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

**REQUEST FOR RECONSIDERATION/OTHER**

11.  The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.  
12.  Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). \_\_\_\_\_.  
13.  Other: \_\_\_\_\_.

*Patricia A. Duffy*  
Patricia A. Duffy  
Primary Examiner  
Art Unit: 1645

Continuation of 3. NOTE: the issue of "only" not previously presented or searched. Further new 112, 1st issues with regard to written description of an antibody with this binding property and new matter issues are raised by the proposed amendment because exclusivity is not supported by paragraph 46, page 14, that specifically indicates that the antibody may cross-react, but not substantially.

Continuation of 11. does NOT place the application in condition for allowance because:

Applicants argue that the term "specific hemolysing-producing fungus" is supported at paragraph 46 page 14. This is not persuasive, the recited property, specificity is a property of the antibody and not the hemolysin nor the fungus. Applicants are mixing and matching different concepts of the specification. To arrive at a different concept, not presented in the specification as originally filed. It is the antibody that is specific. There is no concept that the hemolysin per se is unique to each species (i.e. is species specific). Specificity in this paragraph is the property of the antibody, not the hemolysin. Species specific hemolysins is not supported by a passage drawn to an antibody per se. No studies with multiple hemolysins have been performed to provide for this concept.

With respect to the new matter rejection of claims 30-32, applicants arguments are not persuasive. The method set forth in paragraph 36 provides for conception of a completely different method that does not use antibodies. This passage does not provide conception for the now claimed method, drawn to completely different method steps. As such, the paragraph does not support the later claimed method.

With respect to the indefinite rejection of claims 30-32, applicants emphasize "if". It is noted that the methods steps require obtaining hemolysin "if" present in the sample. How does one know if the sample contains hemolysin? If the samples are not treated all the same, how does the skilled artisan distinguish samples containing hemolysin from those that do not. Applicants are reciting an unknown future property in a active method step. Such is different from screening methods that test all samples whether they may or may not they contain hemolysin.

With respect to the rejection of claims 23-26, under 112" first paragraph, it is noted that the concept of "only" is not provided for in the specification and cannot cross react is not provided for in the recited paragraph. Further, the amendment has not been entered and Applicants arguments that rely upon the entry of the amendment are therefore moot.

Applicants arguments with respect to the art rejections are similar based upon the non-entry of the amendment and are therefore moot.

All objections/rejections are maintained for reasons made of record in the final office action and herein.